



# NATIVE HAWAIIAN LEGAL CORPORATION

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I am writing on behalf of Paulette Ka'anohiokalani Kaleikini, who has retained the services of the Native Hawaiian Legal Corporation in order to protect *iwi* along the proposed transit corridor from unnecessary disturbance.

The City has failed to provide adequate information on the risks of encountering ancient Hawaiian burial remains (*iwi kūpuna*) in the Draft Environmental Impact Statement despite the clear requirements of the National Environmental Policy Act, section 106 of the National Historic Preservation Act, HRS Chapter 343, HRS Chapter 6E and the Hawai'i Constitution Art. XII § 7. Prior to decisionmaking, the City must have sufficient information to objectively evaluate the impacts of the high-capacity transit system on native Hawaiian burials. With this information the City can reach an informed decision on (a) whether to move forward with the project and (b) how the project can be redesigned or re-routed so that burials are not affected.

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Ni'olo. Upright, straight, stately, tall and straight as a tree without branches; sharply peaked, as mountains. Fig., righteous, correct.

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**The Statutory Scheme for Protecting Iwi Kūpuna.** Under the statutory schemes provided by both HEPA, NEPA, and the NHPA, decision-makers must gather the required relevant information that will allow it to *avoid* disturbances of and impacts on preexisting iwi kūpuna, with as much advance information on them so the chances of desecrating them during construction are minimized and ultimately eliminated. A contractor building the rail system should not have to move iwi kūpuna in the midst of construction, if proper investigation and burial identification is completed prior to decisionmaking.

The State Constitution provides that the:

... State shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Haw. Const. Art. XII § 7. As such, the State and all its agencies are "required under the Hawaii Constitution to preserve and protect customary and traditional practices of native Hawaiians." *Ka Pa'akai O Ka'aina v. Land Use Comm'n*, 94 Hawai'i 31, 45 (2000). This places the State under "an affirmative duty" to "protect these rights and to prevent any interference with the exercise of these rights." *Id.* In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the state and its political subdivisions:

must -- at a minimum -- make specific findings and conclusions as to the following: (1) the identity and scope of "valued cultural, historical, or natural resources" in the ... area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources --including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken ... to reasonably protect native Hawaiian rights if they are found to exist.

*Ka Pa'akai* 94 Haw. at 47; See also HRS §§ 205A-4(a), 205A-2(b)(2) and 205A-5(b).

Under HRS chapter 6E, the Island Burial Councils, consisting of a majority of cultural practitioners sensitive to burial matters, have primary jurisdiction over the fate of the iwi kūpuna at rest in "previously identified" burial sites. HRS § 6E-43; HAR § 13-300-33. On the other hand, if those same burials are "inadvertently discovered" because no archaeological inventory survey identified and located them beforehand, the staff of the SHPD must determine the treatment disposition of these burials. HRS § 6E-43.5; HAR § 13-300-40. The only rational reading of this statute is that the island burial council should be given as much information as early as possible in order to assure the proper treatment of any burial remains which could be impacted by development. Accordingly, the State Historic Preservation Division (SHPD) must assure that the councils get as much timely and complete information on the presence and location of iwi kūpuna as possible, so the council may properly exercise its role.

Moreover, the environmental review process requires in part the completion of a “cultural impact assessment” that is designed to shed light on a full range of issues, including the presence of iwi kūpuna which could be impacted by any development. HRS chapter 343. *The Sierra Club v. State Department of Transportation*, 115 Haw. 299, 319; 167 P.3d 292, 326 (2007), citing *Sierra Club v. Hawai'i Tourism Auth.*, 100 Hawai'i 242, 266, 251, 59 P.3d 877, 886, 901 (2002) (declaring that the main thrust of HEPA is to require agencies to consider the environmental effects of projects before action is taken.) This information should be provided at the earliest practicable time in the development review process. *Id.* at 320, 167 P.3d at 327 (mandating an environmental assessment for such action at the earliest practicable time to determine whether an environmental impact statement is required).

Furthermore, Section 106 of the National Historic Preservation Act of 1966 (Public Law 102-575) mandates, in part:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. ...

(Emphasis added). 16 U.S.C. 470f.

The implementation of Section 106 therefore mandates that any federal agency providing financial support for any undertaking engage in *advance* consultation with affected native Hawaiian organizations who attach religious and cultural significance to historic properties which may be affected. That consultation must precede any choice of alternatives. See, <http://www.achp.gov/regs-nhos.html> for specific official Advisory Council on Historic Preservation guidance in conforming to these consultation requirements.<sup>1</sup>

**A History of Desecration.** In recent years, hundreds of burials have been disturbed in urban Honolulu – most of them *after* projects have been approved, contrary to legislative intent. Repeatedly, in dozens of construction projects conducted within the Honolulu urban corridor, the SHPD summarily approved commencement of construction without archaeological inventory

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<sup>1</sup> In particular, the federal guidelines for this process specifies:

The agency must make a reasonable and good faith effort to identify Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.

...

The agency consults with Native Hawaiian organizations to develop and evaluate alternatives to avoid, minimize, or mitigate adverse effects.

surveying in advance. For example, as the SHPD argued in a legal challenge to its handling of the construction of the Keeaumoku Wal Mart store,

... Because the probability of historic sites including burials in the area was low, the State did not recommend any further archeological work for the project. ... Because of the history of this area, land use, environmental data, and the low incidence of burials in surrounding and nearby areas, this project was treated the same as numerous other projects in the nearby and surrounding areas. See Declaration of Sara Collins.

*Hui Malama I Na Kūpuna O Hawai'i Nei v. Wal-Mart, Civ. No. 03-1-1112-05 (1<sup>st</sup> Cir. Ct. 2003), Defendants State of Hawaii, Department of Land and Natural Resources, State Historic Preservation Division, Peter Young, and Holly McEldowney's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction filed June 20, 2003 (hereafter, "2003 SHPD Memo").* In 2003, the SHPD, and developers in general whose projects it reviewed, repeatedly and systematically allowed minimal archaeological review of areas such as the Keeaumoku Wal Mart site, under the mistaken presumption that no burials were likely to be present in such circumstances. This approach was egregiously wanting in terms of protecting these public trust resources.

Following this time period, officials at the State Historic Preservation Division belatedly recognized that its previous presumption that no further archaeological survey work in the Honolulu urban corridor was necessary due to prior ground disturbances might be false, given a pattern of unexpected disturbances:

21. According to SHPD records, between 1986 and 2002, in the areas from River Street to Keaumoku Street, and from Nimitz and King Street, 308 human burials have been found on twenty-six different project sites. Five burials in two projects were preserved in place, and 303 burials were relocated.

22. The 303 burials that were relocated include all of the remains that could have been considered a concentration such as 116 burials found during archeological monitoring of the Queen Street widening project near Kawaihau Church Cemetery, or the 11 burials (of 25 total relocated) from the Honuakaha Smallpox Cemetery that were found during an inventory survey conducted for the Brewery/Honuakaha development project.

*Declaration of Sara Collins, attached to 2003 SHPD Memo.* Thus, according to the SHPD, its own data confirmed that hundreds of iwi kūpuna had been systematically disturbed by construction activity within the Honolulu urban corridor for 16 years because of the failure to require advance archaeological inventory surveying. The SHPD allowed the vast majority, 303 of the 308 remains, to be relocated. The mistaken presumption was that prior ground disturbing construction activity within this urban corridor obviated the need to look further.

Simultaneously, the City and County of Honolulu avoided professional reviews of sites targeted for development by failing to submit proposed permits to the SHPD for professional review and comment as required under HRS § 6E-42. These failures to implement that statute are currently on appellate review by the Hawai'i Supreme Court. Appellate review was necessitated by the City's refusal to reasonably interpret its trust obligations to request review and comment from the SHPD under that statute. The City contends that, notwithstanding its total lack of expertise in the area, its own unilateral assessment of the potential impact on iwi kūpuna of pending permit applications is all that is required.

**Usurpation of the Role of the Burial Council.** Most disturbing, this pattern of relying on prior ground disturbances to relax more rigorous archaeological analysis has sadly resulted in other more serious procedural consequences. Had properly conducted archaeological surveys identified and located burials in advance of construction, the work of the O'ahu Island Burial Council could begin in earnest and with the luxury of time to process all the information, in advance of any pressured environment once construction starts. This would provide iwi kupuna with the dignity and respect they clearly deserve.

Accordingly, the failure to rigorously attempt to identify and locate iwi kūpuna so they are categorized as "previously identified" resulted in the transfer of power and accountability for protecting burials from the island burial council, consisting primarily of cultural practitioners sensitive to burial concerns, to the professional archaeological staff at the SHPD, which is less equipped to deal with the cultural appropriateness of these issues and are saddled with the pressure placed on them by the relationships between state administrative officials and developers. Moreover, when "inadvertently discovered" iwi kūpuna are subject to disposition determination by the SHPD staff, it technically has only 2-3 days to make that determination, typically under the financial pressures facing the developer who must otherwise halt construction. In contrast, the island burial council typically has 90 days to act on a "previously identified" burial site, after it has had a chance to identify cultural and lineal descendants notified of the presence of burials in an area. This extended period and less pressured atmosphere allows for better decisions on often sensitive and contentious matters.

**Lessons Learned.** This systemic desecration of iwi kūpuna for at least 16 years (and probably longer) apparently caught no one's attention until the Wal Mart litigation, and then subsequently in the legal challenge to the SHPD's handling of the General Growth Properties construction of the future Whole Foods store site and planned condominium complex at its nearby Auahi Street properties. *Kaleikini v. Young*, Civ. No. 07-1-0067-01 RKOL (1<sup>st</sup> Cir Ct 2006).

During the *Wal Mart* litigation, the SHPD suggested it acknowledged lessons from its past failings in summarizing the data it had been accumulating:

8. The nature and extent of prior ground disturbance and development may be a reliable indicator of the probable presence or absence of subsurface historic sites. If

prior buildings or structures have not had deeply excavated foundations or pilings, or if there has been little or no prior installation of such features as underground storage tanks or wastewater systems, it is more likely that historic sites, including human burials, are still present below the ground surface.

9. With regard to underlying soil characteristics, there is generally a higher probability of subsurface historic sites, including human burials, in areas underlain by sand deposits.

10. Historical data - such as, inter alia, early written accounts or records, maps, and Mahele information - can indicate the potential for subsurface historic sites, if the subject parcel has not undergone substantial, subsequent modification.

11. Previous archeological work - including inventory survey, data recovery, and monitoring - provides valuable information on the probable presence or absence of subsurface historic sites. Archeological reports on such work normally contain descriptive data of any historic sites found, and include stratigraphic profiles of the buried cultural layers and underlying soil deposits.

*Declaration of Sara Collins, attached to 2003 SHPD Memo.* These same lessons bear on the current proposed construction of the Rail Transit system.

There is a growing body of knowledge and information about the presence and location of iwi kūpuna along the contemplated rail transit route. The City needs to conscientiously search for and obtain as much advance information on the location of iwi kūpuna along its entire route as early as possible to effect reasoned decision-making on the routing of the system. It should not be swayed by previous ground disturbances that do not impact subsurface features, like iwi kūpuna. It should be conscious of the presence of sand deposits anywhere developments are proposed. It should review the growing knowledge base from past projects which have unearthed burials and build upon that material and information.

**Need for Correction.** The failure to follow the law has already disrupted hundreds of what should have been "previously identified" burials in the urban corridor between River and Keaumoku Streets. These are properties which have immense religious and cultural significance to Hawaiians. Had the statutes been followed, subsequent construction activity should never have "inadvertently discovered" these burials and forced their relocation. Repeating these same mistakes with the planned mass transit construction will undermine state and federal statutes designed to protect historic properties of this sort.

Given the high likelihood that burials are located along the route of the proposed transit corridor, clearly past practices must change. The law and the importance of protecting the dignity of these burials require no less.

In short, well in advance of any planning and design decisions, the City should perform an archaeological inventory survey, including subsurface testing, of all areas where (1) stations could be located (b) support pillars could be located and (c) existing underground infrastructure will be moved. It is highly inappropriate and offensive to iwi kupuna and native Hawaiians to delay such testing until after decisionmaking. The information generated AFTER such surveys must and should be included in any DEIS, in order to give the public, interested Hawaiian organizations, and individuals the opportunity to comment on it. Under HEPA, NEPA, and HRS chapter 6E, this information is needed now to ensure that an informed decision is made. Additionally, any delay could jeopardize federal funding because of failure to comply with Section 106 of the NHPA, particularly in developing alternatives to the transit routing.<sup>2</sup> Federal guidelines would restrict taking any action that fails to account for the views of affected native Hawaiian organizations.

In fact, page 4-143 of the DIES states "Native Hawaiian testimonies in Land Commission Award claims indicate that there are documented burials within the study corridor." By acknowledging it has this information, the City is duty-bound to suspend its current approach and comply with the statutory schemes designed to protect these historic properties of religious and cultural significance to so many Hawaiians. Much more advance investigation and surveying is required before any DEIS is made public for comment.

In truth, the contemplated action in the DEIS has it backwards. On page 4-163, the DEIS reads, "Prior to construction, additional archaeological work would be completed to investigate the potential for sub-surface deposits. This additional work would focus on locations of columns, once they are known." Contrary to this proposed approach, the City must first investigate and generate information regarding burial sites so that the City will not locate columns, stations and other underground work where known burial sites are identified and located.

Moreover, the City cannot and should not avoid information that would help locate and identify such historic properties. Instead, it should affirmatively and aggressively attempt to

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<sup>2</sup> Specifically, the Advisory Council on Historic Preservation requires, in part, the development of alternatives in consultation with native Hawaiian organizations:

Involvement of Native Hawaiian organizations in the development of program alternatives

- The agency must consult with affected Native Hawaiian organizations in the development of program alternatives.
- If a program alternative may affect historic properties of religious and cultural significance to a Native Hawaiian organization, the agency shall identify those organizations and consult with them.
- The agency and ACHP must take into account the views of Native Hawaiian organizations in reaching a final decision.

See, Advisory Council on Historic Preservation at: <http://www.achp.gov/regs-nhos.html>.

gather it so complete information is available to generate alternatives, as contemplated under the Section 106 process. The City should also include all this information in this version of the DEIS. Its omission denies affected native Hawaiian organizations the opportunity to be truly engaged and involved in consulting with the applicable federal agency so that these organizations can have a substantive role in the alternatives developed. If it ignores the omitted information, the City will be proceeding down a treacherous path that can only lead to unnecessary delay and cultural conflict.

Ms. Kaleikini has additional concerns about the completeness of the DEIS and urges the City to address these points as follows:

- The DEIS includes no meaningful information regarding the impact on burial sites or any discussion regarding alternatives to affecting these sites. This information is crucial to any development of alternatives as required by federal law.
- Section 4.1 of the DEIS regarding existing land uses should explicitly recognize that burial sites are an existing land use along this corridor.
- Section 4.3 of the DEIS should discuss whether the City plans to displace and relocate existing burial sites and give details about the timing, location and process related to each of these relocations and displacements.
- Section 4.6 of the DEIS should note that desecration – including the relocation – of existing burial sites – is an issue of environmental injustice. The DEIS should, as such, discuss the impact of continuing the pattern set by previous developments, especially in the Honolulu urban core, as outlined above.
- Section 4.17 should be revised in the same manner sections 4.1, 4.3 and 4.6 should be.

Most importantly, these sections of the DEIS need to be amended to identify where burial sites may be so that stations, pillars and underground infrastructure work can be proposed in areas that will not affect burial sites. The need for developing alternatives is crucial and affording affected native Hawaiian organizations the ability and the opportunity to consult on these alternatives is essential. Without the supporting information to allow for a discussion of alternatives, the DEIS is fatally flawed.

Sincerely,



Camille K. Kalama  
Attorney for Ms. Kaleikini